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Maintaining the Status Quo: Electricity Utility Deregulation Difficulties in Ohio

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MAINTAINING THE STATUS QUO: ELECTRICITY UTILITY DEREGULATION DIFFICULTIES IN OHIO

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INTRODUCTION

The current state of affairs in the electrical utility market is enough to give pause to those pressing for a quick and dramatic deregulation of electricity utilities. The threats of rolling blackouts, the bankruptcy of a major utility company, the existence of substantial price spikes, and other difficulties associated with the continued operation of the electrical grid in California serve to provide notice to other states that all may not be well with the electricity industry across the nation. Almost simultaneously, now that the summer electricity crunch has passed, the state of affairs in California may not be as dire as originally thought.[2] While the warning signs of trouble surround us, a workable solution to solve the electricity dilemma appears elusive.

Of the several options currently being considered by various legislatures, deregulation of existing monopolies and allowing market forces to direct the flow of electricity is highly popular. Diametrically opposed to that view, however, is an option that is quickly becoming more attractive to some states and that is to leave the existing monopolies in place. The attractiveness of maintaining a system that is known to the consumer and is comparatively free of the potential pitfalls common to deregulation, real and perceived, is strong.

The Ohio deregulation plan has now been in place for more than two years. To date, the results of the Ohio plan are still in question. There has not been a dramatic shopping effort made by residential customers across the state. Rates have not dropped precipitously across the board for consumers. After an initial rush of power marketers entering Ohio, most of the new players have taken a seat on the sidelines. It remains to be seen whether after the transition period expires in 2005 if these same marketers make a return to the state in an effort to gain market share. And finally, while the situation continues to resolve, utility companies continue to build additional generation facilities to meet rising demand and to improve a utility's ability to sell its power outside its former monopoly area.

In this Article, I seek to review the state of affairs under the Ohio deregulation plan by identifying first the present circumstances in the Ohio electricity utility marketplace and second options that other states, which have not yet deregulated, should consider in developing their plans. In Part I, I examine the current state of electricity utilities in Ohio and the pressures on the legislature that led to calls for deregulation. In Part II, I briefly consider the existing regulatory framework on the state and federal levels. In Part III, I analyze the Ohio deregulation plan with a focus on whether or not, to date, the results are worth the cost. In Part IV, I scrutinize the deregulation plan from the perspective of the consumer – is the plan living up to its billing? – and from the perspective of the utility companies – is the plan functioning as intended and are utilities better or worse off than before deregulation? In Part V, I assess how Ohio's deregulation plan could be improved and used as a model for

[2]In fact, California may now be in the position of having purchased too much power, resulting in a surplus of electricity. Jerry Hirsch, *Sudden Power Glut Puts State in Costly Bind*, L.A. TIMES, Aug. 11, 2001, at A1. Aside from now having more power than it needs, California purchased the power at fixed costs and California is not able to recover at resale, resulting in a loss of $46 million in July 2001. *Id.*

other states that are considering whether it is in the best interests of consumers and providers to attempt to impose a competitive electricity market or to simply maintain the existing monopoly structure. I conclude that despite the quagmire of utility deregulation legislation, those plans must include mechanisms that allow incumbent utilities to recover a reasonable amount of their stranded costs. The implementation of a plan that presents other states considering deregulation with an option, or options, taken from states that have experienced deregulation ensures the continued safe, reliable and cost efficient transmission and distribution of electrical energy. In particular, a primary option for states considering deregulation, and those already in the various stages of implementing a deregulation plan, should be securitization.[3] Securitization is a financing mechanism that allows utilities to recover stranded costs by creation of a marketable security. The use of securitization would allow competition to begin immediately, would ensure recovery of costs to utilities that invested millions of dollars under the monopoly scheme, and would create a more competitive environment to encourage power marketers to enter and remain in the state ensuring consumers alternatives to their existing supplier.

PART I

A. Monopoly Power: How Electricity and Distribution Developed in Ohio

After electrical power became a reliable, relatively safe and an easy to use source of energy, the need for regulation of electrical service was necessary to ensure that all citizens could have access to the benefits of electricity.[4] This required a comprehensive program to govern the expansion of electricity to consumers across the country.[5] Historically the state public utility commission established and defined

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[3]Walter R. Hall, II, *Securitization and Stranded Cost Recovery*, 18 ENERGY L.J. 363 (1998).

> Securitization is a financing tool which has been employed for many years to expand the availability and reduce the cost of consumer and business credit. Securitization achieves this purpose by obtaining funds from the securities markets by means of specially developed securities whose attributes are carefully shaped to minimize investment risk and thereby to obtain a high investment rating with corresponding reduced interest cost.

Id. See also infra notes 137-49 and accompanying text.

[4]It was under this rubric that the regulatory compact evolved to insure that all citizens and businesses present in a geographic area would have access to electricity. *See* Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1243 (1998). "[T]he public utility duty to serve entails several obligations, among them duties to interconnect and extend service if requested, to provide continuing reliable service to provide advanced notice of service disconnection, and to continue service without full payment." *Id.* at 1243.

[5]The presence of a number of small generators gave way to larger generators once the ability to transmit power more efficiently across power lines became a reality. Once this technology existed, then customers could be hundreds of miles from the generation facility and still receive electricity. For this reason, the efficiency of having larger producers that could provide power to more customers over a larger geographic area began to take hold and consolidation took place. *See, e.g.*, Federal Power Act, 15 U.S.C. § 717 2002; Public Utility Holding Company Act, 15 U.S.C. § S79 2002.

the monopoly service territory for each utility company.[6] In an effort to accomplish this objective, the creation of monopoly territories for utility companies soon followed.[7] The benefits of monopoly power were substantial, including reliable service, fixed prices, and economic stability of utility companies that were then less likely to go out of business and interrupt the necessary flow of electricity to consumers.[8] There were also drawbacks to be sure, not the least of which were a lack of competition and non-competitive pricing, and no availability of other options for consumers unless they were large enough to consider generating their own power.[9] For these and other reasons, large geographic areas were divided up and utilities were awarded the right to provide exclusive service to those areas.[10] As part

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[6]*See* RAYMOND S. BOLZE & DEBORAH A. CARPENTIER, STRUCTURING TRANSACTIONS AGAINST THE BACKDROP OF REGULATION: ANTITRUST ISSUES, 25, 29 (PLI Corp. Law & Practice Handbook Series No. 1082, 1988) (*citing* Energy Information Admin., *The Changing Structure of the Electric Power Industry: An Update*, Dec. 1996 at 1, 5, 7).

[7]In order to ensure that all consumers were able to have service, the state intervened and created geographic territories that particular utilities were required to service (i.e., the beginning of monopoly power). The existence of municipal generators continued to exist parallel to the monopoly utilities and they were allowed to serve very restricted areas within its borders. *See generally* Bentzion S. Turin, *Eastern Philosophy: A Constitutional Argument for Full Stranded Cost Recovery by Deregulated Electric Utilities*, 36 HOUS. L. REV. 1411, 1413 (1999). *See also* OHIO REV. CODE ANN. § 4933.83(B) (West 2001) (grant of exclusive territory).

[8]*See* Rossi, *supra* note 4, at 1253-54.

> Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service that they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence. . . .

Id. (*quoting* New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917)).

[9]Because utilities had unfettered control due to monopoly grants, consumers were at the mercy of the utilities and the regulatory bodies that oversee their operation, rates, and business practices. *See* Rossi, *supra* note 4, at 1241-42.

[10]*See, e.g.*, Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?*, 21 ENERGY L.J. 27 (2000).

> Under the natural monopoly paradigm, a vertically-integrated electric utility provides generation, transmission, and distribution services under the rubric of a single firm serving a geographic territory. While it is allowed to operate as a monopolist, this firm also has certain responsibilities. It submits to price regulation, assumes obligations to extend service to all customers within its geographic service territory, and agrees to continue providing service, once service has commenced.

Id.

The Ohio Revised Code grants utilities exclusive rights to serve a territory, and establishes the utility's "duty to serve" where it states, "[e]lectric suppliers shall furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories that they are authorized and required to serve pursuant to sections 4933.81-4933.90 of the Revised Code." § 4933.83(B).

of the regulatory compact, utilities provided service to consumers at a fixed price and shareholders were assured a fixed rate of return.[11]

Once granted, the utility company was bound by a "duty to serve" all customers within that service territory.[12] The existence of such a regulatory compact assures a relatively equal balance of risk distributed between the producer (utility) and the consumer (customers).[13]

B. How Stranded Costs Impact the Duty to Serve and the Regulatory Compact

Stranded costs refer to the investments made by utility companies in generation facilities and transmission systems that, prior to deregulation, were recoverable over a fixed period of years.[14] There are wide ranging estimates as to the total amount of

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[11]The regulatory compact is a concept under which a fictional contract between the utility and the state existed whereby the state granted the utility its exclusive service territory, and the utility consented to certain obligations (the "duty to serve") in exchange for the right to a "geographic franchise" and guaranteed recovery of costs via state-controlled and approved rates. Rossi, *supra* note 10, at 30. *See also* Leigh H. Martin, *Deregulatory Takings: Stranded Investments and the Regulatory Compact in a Deregulated Electric Utility Industry*, 31 GA. L. REV. 1183 (1997); Rossi, *supra* note 4, at 1248-49.

In Ohio, in order for a utility to charge a certain rate for their service, an application, hearing and order must first take place. The Public Utility Commission of Ohio (PUCO) is the governing body granted the authority to decide rates. § 4909.15. The grant of authority to the PUCO includes the ability to deny rate requests and/or modify a utility company's rate request in order to ensure the rates are within PUCO's acceptable guidelines. *Id.*

[12]*See* Rossi, *supra* note 10, at 29. The "duty to serve" concept has not been universally accepted. *See, e.g.*, Kenneth Rose, *Securitization of Uneconomic Costs: Whom Does It Secure?*, 135 No. 11 PUB. UTIL. FORT. 32 (1997). Mr. Rose refers to stranded costs intentionally as "uneconomic costs." In addition, Mr. Rose finds that the regulatory compact is not in fact as established as others; he finds that there is no duty on the part of consumers to purchase electricity. *Id.* Contrary to this position, a homeowner who cannot invest in his own generation facility is left with the choice of purchasing electricity from the monopoly supplier or having no electricity at all.

Because regulators could not create a "perfect" system, their role instead became one of safeguarding consumers. *Id.* While Mr. Rose is correct in that regulation was never intended to be a substitute for competition, neither is it the role of regulators to impose one party's view of "perfection" on another, but instead to act in the best interest of all parties subject to the transactions in question. By simply asserting that regulators are incompetent or unable to create a perfect environment fails to grasp the point of the argument – that utilities selected by the state and governed by the dictates and policies of the regulatory body were not free to close shop in one area and move to another and sell their wares. *See generally* Rose, *supra* note 12. It is simply impossible and as such, a workable compromise had to be developed to ensure a safe, reliable source of electricity to citizens in a given geographic area.

[13]Rossi, *supra* note 10, at 30.

[14]Martin, *supra* note 11. Stranded costs are the uncompensated expenses incurred by utilities to ensure compliance with statutory requirements to provide service to consumers within a service territory that do not allow the utility to recover a reasonable rate of return on its investment. *Id.*

stranded costs presently unrecovered, but the range is up to more than $200 billion.[15] One study found that nearly $200 billion in stranded costs exist in three main categories: (1) nuclear power plants (eighty-six billion dollars), (2) power purchases from other utilities (fifty-four billion dollars), and (3) regulatory assets (forty-nine billion dollars).[16] With the onset of deregulation, utility companies would no longer be able to recover stranded costs over a fixed period of time without a substantial increase in the cost of their power compared with power marketers who do not bear the costs of prior development of the electrical grid.[17] This clearly is a competitive disadvantage resulting not from current operations, but instead from past development of the electrical grid under a completely different paradigm: a paradigm that assured recovery of the costs to serve consumers in the monopoly territory. As a result of the shift in the utility paradigm, the question of an unconstitutional taking arises with respect to stranded costs.[18]

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[15]Christopher Seiple, *Stranded Investments: The Other Side of the Story*, 135 No. 6 PUB. UTIL. FORT. 10 (March 15, 1997). Of that amount, $137 billion is directly tied to investor-owned utilities. *Id.*

[16]*Id.*

[17]William J. Baumol & J. Gregory Sidak, *Stranded Costs*, 18 HARV. J. L. & PUB. POL.'Y 837, 843-44 (1995). Because new power marketers are reselling power generated by others, or in the alternative, other utilities that may enter the market and have recovered stranded costs prior to market entry under state-approved plans, the recovery of stranded costs would not impact the resale of power by such entities in the way it would suppliers still recovering their stranded costs. *Id.*

[18]The Fifth Amendment prohibits a state from "taking" property without adequate compensation. U.S. CONST. amend. V.

In the context of utility deregulation, the issue is one of regulatory takings. The state is not acting to take the utility's physical property, but instead, by issuing the regulation mandating competition in the electricity market, reduces the value of the generation and transmission and distribution facilities. Martin, *supra* note 11, at 1192-93.

A regulatory act that removes the protections of a state-protected market can give rise to constitutional issues. The nature of the utility structure mandates that the courts treat it differently than other entities. Dusquesne Light Co. v. Barasch, 488 U.S. 299, 307 (1989). The problem arises when regulators' acts destroy the regulatory compact without affording investors the right to recover a reasonable return, thereby "taking" the investment capital. *See* Martin, *supra* note 11, at 1195.

When the court evaluates a regulatory takings claim the burden of proof rests on the party seeking to show the regulation is "unjust and unreasonable in its consequences." Martin, *supra* note 11, at 1196 (*citing* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)). The courts have also specified that where the claims are based merely on rate questions a different test will apply. In *Duquesne Light Co. v. Barasch*, the Court held that a two-part test applies to ratemaking claims of unconstitutional takings. First, a court must look to see if the rate would place the utility in jeopardy of financial ruin. *Duquesne*, 488 U.S. at 312. Second, the court must make a comparison between the rate allowed by the state and the return on investments with comparable risk. *Id.* at 314. The Court found that an unconstitutional taking occurs when a regulation unreasonably impacts either factor. *Id.* at 312.

Unfortunately this standard leaves substantial room for interpretation by lower courts as they evaluate questions of regulatory takings. *See e.g.*, Jersey Cent. Power & Light Co. v. Fed. Energy Regulatory Comm'n, 810 F.2d 1168 (D.C. Cir. 1987) (holding that a hearing was required so that the utility had the opportunity to show that a $397 million investment in a

Because electric utilities have operated under a natural monopoly for more than a century, the expansion of the utility's operations – including the costs of production and transmission – has historically been governed by the state public utility commission [hereinafter "PUC"].[19] The ability to recover the costs of production and transmission was ensured by the PUC-approved rate structure and cost recovery occurred over a defined period of years.[20]

There are those who argue that "true" competition mandates that the former monopolist utilities bear the costs exclusively and permit consumers to seek out the lowest cost provider.[21] This argument does not address the regulatory compact and statutory obligation to provide electricity to consumers.[22] Others argue that this degree of financial strain on the electrical utilities which expanded and planned their infrastructure based on the understanding that they would be able to recover costs that they are required by statute to bear in an effort to serve those customers, amounts to an uncompensated taking or to detrimental reliance on the PUC to honor its part of the regulatory compact.[23] Under the Ohio deregulation plan, utility companies are permitted a five-year period during which they can recover "stranded

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nuclear power plant would not be recoverable without a base rate increase); Cook Inlet Pipe Line Co. v. Alaska Pub. Utilities Comm'n, 836 P.2d 343 (Alaska 1992) (holding that a fifty-seven percent reduction in the utilities base rate was not an unconstitutional taking because the utility failed to show detrimental impact of lower rate).

[19]OHIO REV. CODE ANN. § 4905.15 (West 2001). The PUC bears the responsibility of determining the appropriate rate that a utility provider can charge. The statutory grant of authority defines the parameters within which the PUC must operate, but does provide a substantial amount of leeway in setting of rates. The PUC is also responsive to public pressure when determining the "appropriate" rate.

[20]DEAN E. CRIDDLE, FUNDAMENTAL PRINCIPLES OF ELECTRIC UTILITY SECURITIZATION, (PLI Corporate Law & Practice Handbook Series B0-00I5, 2000). Under the Ohio plan, these "stranded costs" were recoverable for five years. *See, e.g.*, OHIO REV. CODE ANN. §§ 4928.37-.40 (West 2001); *see also* In re FirstEnergy Corp., No. 99-1213-EL-ETP, 2000 WL 1791792 (Ohio P.U.C. July 19, 2000); (approval of FirstEnergy Corp.'s transition plan); *cf.* In re Elec. Transition Plans, No. 99-1141-EL-ORD, 1999 WL 1456539 (Ohio P.U.C. Nov. 30, 1999).

[21]*See* Elizabeth A. Nowicki, *Denial of Regulatory Assistance in Stranded Cost Recovery in a Deregulated Electricity Industry*, 32 LOY. L.A. L. REV. 431 (1999). Unfortunately this position fails to recognize that if the monopoly provider must absorb potentially billions of dollars of expense, its rates will have to be substantially higher than providers who do not have such costs to consider. Customers would seek out the lower cost, further reducing the financial stability of existing utilities and potentially threatening the state, regional and national power grid.

[22]*See, e.g.*, Rossi, *supra* note 4, at 1236-37. *See also* § 4905.22 (which states "every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable" *Id.*).

[23]It is constitutionally settled that public utilities are not subject to the same standard as other *private* business, i.e., constitutional review of economic due process. Calfee, Halter & Griswold, LLP & Roetzel & Andress, LPA, White Paper: Retail Wheeling: Constitutional Recovery of Stranded Costs, A Rejoinder of the Coalition for Customer Choice in Electricity, 8-10 (on file with author). Instead, public utilities are granted greater deference to state rate-making bodies to ensure that investor's receive a moderate rate of return on their investment, as a function of the utilities limited monopoly status. *Id.*

costs," which are estimated to exceed $3 billion. After that time, the stranded cost load[24] will be removed from the rates of energy marketers.[25] Because five years is not a long enough period of time to recover such a vast investment without unduly burdening the newly competitive market, the use of another means to recover that investment, such as securitization, would both achieve the goal of an immediately competitive market and provide a mechanism to permit existing utilities to recover their substantial investments.[26]

The question then must be asked - should utilities be forced to absorb the entire amount of their stranded costs under deregulation? The utilities' costs were a forecast for recovery over a fixed period of years as a portion of the consumer's base rate.[27] Additionally, these costs were distributed over the entire customer base to keep the costs affordable for new customers and to assist areas the utility was required to serve in their service territory.[28] I conclude that utilities should not be so required.[29] Further, of the methods available to address the problem of stranded costs, an effective method for Ohio and other states would be the use of securitization.[30]

This view is not universally accepted. Those who oppose stranded cost recovery argue that allowing recovery to take place in this way encourages the utility to spend, wisely or not, because it is assured recovery for the investment.[31] It should be

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[24]Utilities recover their investments in generation and transmission and distribution over a period of years, each year passing the cost to customers they are obligated to serve. *See* Hall *supra* note 3, at 370-77; WILLIAM D. STEINMEIER & LINDA G. STUNTZ, EDISON ELEC. INST., STRANDED COSTS: A STUDY ON THE TREATMENT OF, AND JURISDICTION OVER, ELECTRIC UTILITY COSTS DURING TRANSITION TO A MORE COMPETITIVE INDUSTRY (1994).

This "loading" of the customer's rate allows the utility to recover the investment that it is required to make in order to comply with the regulatory compact/duty to serve by spreading the cost to all customers and thereby making the cost affordable to new customers. By achieving recovery in this fashion, the utility is able to meet the statutory mandated goal of service and maintain financial solvency. *Id.*

[25]OHIO REV. CODE ANN. § 4928.20(A) (West 2001). Other states have taken alternate approaches to transition periods. Pennsylvania, thought by many experts to have the best deregulation plan currently in place, developed a structured transition plan that allowed electric utilities to retain generation, recover stranded costs, and still compete for consumers business. *See e.g.*, N.H. REV. STAT. § 374-F:3 (2001); 15 PA. CONS. STAT. ANN. § 7407 (West 2001).

[26]*See* discussion *infra* notes 129-64, and accompanying text.

[27]This ratemaking is done by the utility company but requires the approval of the PUC to ensure fairness. OHIO REV. CODE ANN. § 4905.22 (West 2001).

[28]One of the important considerations of the regulatory compact is the promise to serve all customers including those customers who are significantly more expensive to serve (e.g. the rural customer). *See* Rossi *supra* note 4, at 1241-45.

[29]*See infra* notes 129-50, and accompanying text.

[30]*See infra* notes 138-50 and 155-63 and accompanying text.

[31]*See generally,* Nowicki *supra* note 21, at 436 (*citing Consumer's Lower Electric Bills Hinge on Congress*, USA TODAY, Mar. 7, 1997, at 10A). It should be remembered that no guarantee exists that a state regulatory agency will allow a utility to recover 100% of all costs and expenses incurred by the utility.

reiterated that utility rates are reviewed and approved or rejected by the state PUC.[32] This oversight reduces the likelihood that a utility can spend more on production and transmission and distribution than is prudent because the PUC does not have to guarantee complete recovery of costs.[33]

C. So Who Decided that Deregulation was Such a Good Idea Anyway?

Utility companies and residential consumers did not push for electricity deregulation. Across the nation, the push came primarily from large industrial companies, who envisioned a competitive market forcing utility companies to compete for their large contracts.[34] Unfortunately for consumers, the decision to pass deregulation legislation appeared to be a question of when and how to deregulate as opposed to whether consumers favored deregulation. As a result, the consumer was effectively denied the ability to exert any political will in shaping the legislation, which would ultimately impact them directly.[35] Instead, utility companies, legislators, political action committees and the industrial customers who

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[32]OHIO REV. CODE ANN. § 4909.15 (West 2001).

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
> (1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined...
> (2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section ...;
> (3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;
> (4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

Id. The PUC also ensures that no rates charged by utilities are unreasonable. § 4905.22.

[33]OHIO REV. CODE ANN. § 4928.37 (West 2001). The PUC ultimately has the ability to reject a utility's request for recovery of its cost for construction of generation and/or transmission and distribution facilities. *Id.* In the event that a utility unwisely or recklessly spends funds on a questionable project the PUC can force the utility to bear the cost of the project. Doing so then reduces the amount of money available for other uses and projects, not least of which is the payment of dividends to shareholders. Because the "typical" shareholders of utility stocks are older, retired individuals, the payment of dividends is vitally important. THE OHIO ELECTRIC UTILITY INSTITUTE, ELECTRIC RESTRUCTURING IN OHIO: THE BIG PICTURE 12 (1999). If utilities are not stable in payment of dividends to investors it may not have investors interested in holding the stock over a long period of time.

[34]*See, e.g.*, Pennsylvania Public Utilities Commission, Report and Recommendation to the Governor and General Assembly on Electric Competition, Docket No. I-940032 (July 1996).

[35]Consider the problems that occurred in San Diego when utility bills increased by more than twenty-five percent and consumers were forced to bear the cost. Frank Green, *Surging Power Prices Turn up Heat on Business Smaller Stores Grapple with Ways to Absorb Costs,* SAN DIEGO UNION-TRIBUNE, July 16, 2001, at A-1. Unfortunately, the Ohio deregulation plan had already been put in motion and the legislation passed, so there will be no turning back.

set the process in motion were left in control of developing a deregulation plan that the Ohio legislature would find acceptable and pass into law.[36]

Congress has also considered how to deregulate the electricity utilities.[37] Currently, no decision has been made by Congress as to what level of involvement the federal government should have in the deregulation of the electricity utilities beyond the authority currently in place.[38] The House of Representatives expressed the following sentiment during the 105th Congressional Session,

> [T]he development of vibrant competition in the retail market for electric energy will: (A) reduce the cost of even the smallest consumers of electricity; (B) create jobs as American businesses are able to lower costs and better compete in the world markets and against foreign competition here at home; and (C) result in a more efficient utility industry.[39]

Clearly, Congress is in favor of deregulation of electric utilities; the question that remains is what level of involvement Congress will exert.[40]

PART II

A. Regulations Everywhere – What's the Buzz All About?

1. The Basics: Federal Statutes Granting Authority Over Utilities

The federal government's involvement in the utility industry began in 1920 with the passage of the Federal Power Act.[41] The passage of the Public Utility Act of

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[36]*See, e.g.*, UTIL. WORKERS UNION OF AMERICA, POWER OUTRAGE, UWUA STRATEGIC PLAN – FIGHTING DEREGULATION (1997). The goal of the UWUA was stated thusly, "[w]hy would we want to risk the quality, reliability, efficiency and relatively low cost of our current electric utility system?" *Id.* The AFL-CIO fought the bill in the House along with the UWUA, SEIU, and IBEW. The UWUA worked closely with the Ohio Alliance for Affordable Energy, which was funded entirely by Ohio Edison, to resist deregulation. *Id.*

[37]Nowicki, *supra* note 21, at 437-38.

[38]*Id.*

[39]Electric Consumers Power to Choose Act of 1997, H.R. 655, 105th Cong. § 2(a)(5) (1997). The Senate also voiced its view in stating that, "[i]t is in the public interest that consumers receive reliable and inexpensive electric service and competition among electric suppliers can produce these benefits." Electric Consumers Protection Act of 1997, S. 237, 105th Cong., § 2(b) (1997).

[40]Historically, federal and state regulations operated in tandem; federal law governed wholesale transactions and states governed retail wheeling. Federal Power Act, 15 U.S.C. § 717 (2001); OHIO REV. CODE ANN. § 4905 (West 2001). However, it is not beyond the realm of possibility for Congress to preempt regulation of utilities from the states and implement a national scheme. In the event Congress was to act to preempt electricity deregulation, all state deregulation plans would be effectively repealed and the federal plan would govern.

[41]*See* Turin, *supra* note 7, at 1413. The Federal Power Act granted authority over licensure of hydroelectric power plants on navigable waterways. *Id.*

1935 expanded federal involvement to regulate the interstate transmission and sale of electricity through the Federal Power Commission [hereinafter "FPC"].[42]

There are four primary pieces of legislation that govern the electric utility industry.[43] The Federal Power Act of 1935 [hereinafter "FPA"] established the Federal Power Agency (now the Federal Energy Regulatory Commission [hereinafter "FERC"]) granting it the authority to govern wholesale energy transactions.[44] The Public Utilities Holding Company Act of 1935 [hereinafter "PUHCA"] requires utilities to register with the Securities and Exchange Commission [hereinafter "SEC"] and limits the structure of utility companies to prevent abuses of market power.[45] The Public Utilities Regulatory Policy Act of 1978 [hereinafter "PURPA"] opened the door to competition in generation by reducing barriers to entry into the generation market.[46] The Energy Policy Act of 1992 [hereinafter "Energy Act"] allowed electric utilities to enter previously closed markets by permitting open access to the transmission grid.[47]

Presently, states control the retail wheeling of electricity and the federal government maintains control over wholesale transactions including transmission and distribution.[48] Federal involvement in electric utility matters is quite substantial in other areas, but they are beyond the scope of this Article.[49]

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[42] *Id.* The creation of the FPC created a regulating body to oversee the newly-enacted legislation and to make determinations as to the permissibility of certain transactions between or by utility companies.

[43] Federal Power Act (FPA) of 1935, 15 U.S.C. § 717 (2001); Public Utilities Holding Company Act (PUHCA) of 1935, 15 U.S.C. § 79 (2001); Public Utilities Regulatory Policy Act (PURPA) of 1978, 16 U.S.C. § 2621 (2001); Energy Policy Act (Energy Act) of 1992, Pub. L. No. 102-486 (1992).

[44] *See* Federal Power Act (FPA) of 1935, 15 U.S.C. § 717 (2001). In addition, the creation of an agency to oversee interstate transactions remedied the problem of transactions that states were unauthorized to address. *Joint Legislative Committee on Electricity Industry Restructuring, Hearing #5*, May 1, 1997, Topic III: Legal and Regulatory Issues, 1 (1997).

[45] *Joint Legislative Committee on Electricity Industry Restructuring, Hearing #5*, May 1, 1997, Topic III: Legal and Regulatory Issues 2, (1997). The PUHCA was passed in response to fraudulent acts committed in the 1920's by utility companies. *Id.* Note that there is currently pending legislation that may repeal the PUHCA. S. 206, 107th Cong. (2001) (Public Utility Holding Act), failed to get out of committee in 2001.

[46] *Id.*

[47] *Id.* The Energy Act also increased competitive pressures by expanding a utilities ability to own foreign utility companies and to operate generation facilities outside their service territory. *Id. See also* Energy Policy Act of 1992 (Energy Act) PL 102-486, 1992 HR 776, Oct. 24, 1992.

[48] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 7 C.F.R. § 1789 (1996) [hereinafter Order No. 888].

[49] For example, in order for a utility merger to be completed and approved, the Department of Justice, Securities and Exchange Commission, FERC, and other federal agencies must grant their approval. In addition, the maintenance of RTOs and ISOs are governed by FERC. *See* Sarah E. Strasser & Ilene Knable Gotts, UTILITY CONSOLIDATION IN THE FACE OF DEREGULATION: MUCH ADO ABOUT NOTHING, OR THE TEMPEST, 389, 393-94 (PLI Corp. Law

a. FERC Orders Nos. 888, 889: Starting the Shift to Competition on the Wholesale Level

FERC Order No. 888 dramatically shifted the electricity utility paradigm into a competitive environment. Order No. 888 opened sales of wholesale power to competition.[50] FERC Chair Elizabeth Moler stated that, "[t]hese rules will accelerate competition and bring lower prices and more choices to electricity customers." Ms. Moler added, "[t]he future is here, and the future is competition. There is no turning back."[51] FERC anticipates that Order No. 888 will generate savings from competition in the wholesale energy market of approximately $3.8 and 5.4 billion per year once the transition to a competitive marketplace is complete.[52]

& Practice Handbook Series No. 1060, 1998). FERC's review of utility mergers focuses on six primary considerations: (1) the effect of the proposed merger on competition; (2) effect of the merger on the applicant's operating costs and rate levels; (3) the reasonableness of the purchase price; (4) whether the acquiring utility coerced the to-be-acquired utility into accepting the merger; (5) the impact of the merger on the effectiveness of federal and state regulation; and (6) the contemplated accounting treatment of the merger. *Id.*

The Environmental Protection Agency is heavily involved in issues concerned with emissions and environmental protection including enforcement of the Clean Air Act, Clean Water Act, and other statutes that directly impact the operation of electric utility generation facilities. While not directly related to governance of competitive pricing, it is important to understand the interrelation between electricity generation and environmental issues.

The cost of compliance with EPA mandates is substantial. For example, FirstEnergy Corp., an Akron, Ohio based utility company, has spent more than $4.5 billion dollars in its effort to comply with the Clean Air Act requirements on particulate matter and gases released in the operation of generation facilities. Deregulation introduces uncertainty on the environmental side of the equation as well. *See* Rudy Perkins, *Electricity Deregulation, Environmental Externalities and the Limitations of Price*, 39 B.C.L.REV. 993, 1010-16 (1998). The costs associated with building a new generation facility can make the prices charged to consumers uncompetitively high as utilities seek to increase their capacity but must pass along those costs to consumers. *See* Leslie Lamarre, *Utility Consumers Go for the Green*, EPRI Journal March/April 1997 (observing that some consumers are willing to pay a higher (i.e., less competitive) rate for electricity from "green" utilities, that is, those that use non-polluting energy generation resources (e.g., wind, solar, etc.)). A less costly option, and one which raises environmental concerns, is the long-term operation of antiquated generation facilities to meet demand. *See* Executive Summary, *Air Quality and Electricity Restructuring: A Framework for Aligning Economic and Environmental Interest Under Electricity Restructuring*, Center for Clean Air Policy, March 1997. Older generation facilities tend to be larger, coal-fired plants that operate less efficiently and less cleanly than new plants do; however, the Clean Air Act mandates that utility emissions meet reduced standards, so operation of older plants would require retrofitting of the plant to meet the current emissions requirements. This may or may not be less expensive than building a generation facility from the ground up.

[50]Order No. 888, *supra* note 48. FERC's grant of power authority is derived from the Federal Power Act of 1935, 49 Stat. 847 (1935) (codified as amended at 16 U.S.C. §§ 791(a)-828c (1994)).

[51]News Release, Fed. Energy Regulatory Comm'n, Commission Orders Sweeping Changes for Electric Utility Industry, Requires Wholesale Market Open to Competition, (Apr. 24, 1996) Nos. RM95-8-000, RM94-7-001, RM95-9-000, and RM96-11-000, April 24, 1996.

[52]Fact Sheet, Fed. Energy Regulatory Comm'n, Electricity Utility Restructuring, (Apr. 24, 1996) (on file with author).

On the state level, Order No. 888 stated that competition would be governed by state regulating bodies which would have authority over all aspects of distribution of electricity to end users of the electricity.[53] In order to accomplish this goal, all transmitting utilities were required to provide "open access transmission service tariffs" that defined the terms and conditions for "non-discriminatory" use of the transmission capabilities and ancillary services.[54] Simultaneously, FERC authorized transmitters to recover "legitimate, prudently incurred, and verifiable" stranded costs that arose due to the open access ruling (*i.e.* stranded costs).[55]

FERC Order No. 889, a supplement to Order No. 888, required utilities to create and sustain Open-Access Sametime Information System [hereinafter "OASIS"] on which all transmission information is to be posted.[56] This provision for the real-time sharing of information among utilities was intended to ensure that wholesale transactions be made with full disclosure and thus, promoting competition.[57] Order No. 889 applies to any public utility offering open access transmission services, including wholesale transmission and retail transmission customers that have the capacity to receive unbundled retail transmission.[58]

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[53]*Id.*

[54]Jones, Day, Reavis & Pogue, 20 ENERGY BULL., May 1996 (on file with author). *See also* Strasser & Gotts, *supra* note 49.

[55]*Id.*

[56]*Id.* Order No. 889 mandated that all public utilities (1) join or create an OASIS and (2) abide by the developed standard of conduct. *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standard of Conduct*, 61 Fed. Reg. 21737 (to be codified at 18 C.F.R. pt. 37) (May 10, 1996) [hereinafter Order No. 889]. This standard of conduct requires utilities to separate the generation and transmission and distribution portions of their operation. *Id.* Order 889 also created rules governing Regional Transmission Groups (RTGs) and Independent System Operators (ISOs). *Id.*

FERC's purpose in creating the transmission and distribution ISOs/RTOs requires owners of transmission line owners to sell their transmission capacity to others, thus improving the ability of generators to transmit power across the grid. *See* Strasser & Gotts, *supra* note 49, at 393.

[57]*Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, F.E.R.C. Stats. & Regs. (CCH) ¶ 31,035 (Apr. 24, 1996). Subsequently, FERC issued Order 889A granting a rehearing on the Order 889. Ultimately, Order 889 was left virtually intact. Strasser & Gotts, *supra* note 49, at 394 n.21.

[58]F.E.R.C. Fact Sheet, Electric Utility Restructuring, Apr. 24, 1996. *See also* Strasser & Gotts, *supra* note 49, at 394. The requirement that utilities share information concerning basic "terms and conditions of non-discriminatory transmission tariffs outlining basic terms and conditions of 'non-discriminatory' service or 'wheeling'" is intended to produce an open market where market forces will direct supply and demand issues. *Id.* (*quoting* Promoting Wholesale Competition through Open Access Non-Discriminatory Transmission Service by Public Utilities; Recovery of Standard Costs by Public Utilities and Transmitting Utilities, F.E.R.C. Stats. & Regs. (CCH) § 31,036 (Apr. 24, 1996).

FERC issued Order No. 889 (the OASIS rule) to ensure that generators and transmission line owners were not able to create "preferred" information advantages with respect to the sale of power (e.g. when availability was greatest and the rate would then be lowest for the generator). Strasser & Gotts, *supra* note 49, at 394.

b. FERC Involvement in State Deregulation

Since its creation, FERC has operated in a dualistic role with state regulatory agencies, with FERC governing wholesale transactions,[59] and the state public utility commission overseeing retail pricing and distribution of electricity.[60] The Public Utility Commission of Ohio [hereinafter "PUCO"], for example, has exclusive jurisdiction over the retail pricing and distribution of electricity within the state of Ohio.[61] The grant of authority from the Ohio legislature includes the jurisdiction over pricing of electricity and recovery of reasonable costs incurred to facilitate service to consumers.[62] This grant of authority vests with the PUCO the right to accept, reject or modify the rates proposed by utilities.[63]

The Ohio Revised Code defines the rights and responsibilities of utility companies.[64] Included in the obligations of monopoly utilities is the requirement that a utility serve all customers in the geographic area assigned to it.[65] This duty to serve,[66] discussed *supra*, requires a utility to provide service to customers without discrimination. The monopoly utility also had to be concerned with the normal costs and requirements of transacting business.[67] Prior to the implementation of

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[59]A wholesale transaction is typically defined as one that occurs between utilities, independent power generators, municipalities and/or co-ops who sell their power and distribute it to consumers. Joint Legislative Committee on Electricity Industry Restructuring, Hearing #5, May 1, 1997, Topic III: Legal and Regulatory Issues 2 (1997).

[60]"Retail" in the context of utility transactions refers to the sale of electricity to residential, small business, and industrial consumers. *Id.* Retail pricing includes loads for generation, transmission, distribution and any ancillary costs associated with support of the electrical grid. *Id.*

[61]OHIO REV. CODE ANN. § 4905.15 (West 2001).

[62]*Id.*

[63]*Id.*

[64]OHIO REV. CODE ANN. § 4933 (West 2001). *See also* OHIO ADMIN. CODE § 4901-5-17 (West 2001).

[65]§ 4933.83(A). The statute states:

> Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier, provided that nothing in sections 4933.81 or 4933.90 of the Revised Code shall impair the power of municipal corporations to require franchises or contracts for the provision of electric service within their boundaries, and provided that any electric supplier may extend its facilities through the certified territory of another electric supplier to contract any of its facilities, to serve electric load centers within its own certified territory or to interconnect with other electric suppliers.

Id.

[66]*See supra* notes 14 to 33 and accompanying text.

[67]These concerns involve wide and varied matters including weather, union and labor negotiations, supply and costs of fuel(s), environmental compliance, and other government regulations.

competition into the market, the monopoly utility still had to ensure that customers were served in a consistent, safe manner, or be subject to the scrutiny and possible levy of fines for violation of the statutory duties imposed on utilities in exchange for the monopoly territory.[68]

PART III

A. The Ohio Plan: Competition Comes to Ohio, But at What Cost?

Ohio historically has had some of the lowest utility rates in the United States across the electricity consumer spectrum.[69] Energy prices on the whole have consistently been lowered over the past fifteen years, adjusted for inflation.[70] Despite this relatively favorable price position across the national utility spectrum, deregulation of electricity utilities was pressed through the Ohio legislature.[71]

Why then did the Ohio legislature elect to pursue electricity utility deregulation? Primarily, large industrial companies lobbied the legislature seeking to lower their fixed costs by being able to force electric utilities to compete for their business.[72] Senate Bill 3 creates a "competitive environment" in the Ohio electric market by deregulation of the monopolistic structure of the Ohio electricity market.[73] The stated goal of that legislation is to deregulate electric utilities and encourage

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[68]*See* Phil Porter & Mark Niquette, *State Fines Ameritech for Bad Service*, THE COLUMBUS DISPATCH, Feb. 1, 2002, at 1A.

[69]The Potential Economic Impacts of Retail Wheeling in the Electric Utility Industry in Ohio Submitted to Ohio Alliance for Affordable Power Small Business Survival Council (presented by Texas Perspectives, Inc. on Aug. 1, 1997). The low cost applies to commercial, residential, and industrial customers. *Id.*

Variations in utility costs across the nation have many causes including "1) proportion of generating capacity, both operable and inoperable, that is nuclear; 2) the level of statewide construction costs; and 3) market concentration..." Glenn D. Meyers, et al., *Stranded Utilities: How Demographics, Not Management, Caused High Costs and Rates*, 135 NO. 11 PUB. UTIL. FORT. 18 (1997). Meyers, et al., posit that management inefficiencies are not responsible for more than twenty percent of the variations in utility costs, but that costs associated with nuclear facilities drove up the overall cost of utility service. *Id.* Meyers, et al., argue for stranded cost recovery, though, based on the fact that recovery of nuclear expenses would have resulted in losses, rather than earnings, in those states which are heavily dependent on nuclear power. *Id.* Arguably, the use of nuclear power was in part a decision by utility company management to comply with environmental regulations under the Clear Air Act. Howard Learner, *Cleaning, Greening and Modernizing the Electric Power Sector in the Twenty-First Century*, 14 TUL. ENVTL. L.J. 277, 282-83 (2001).

[70]Jerry Taylor, *A Man, A Plan – A Waste of Time*, NAT'L REV., June 11, 2001, at 17.

[71]Those in favor of deregulation were fought by utilities, unions, and other interested parties that sought to maintain the status quo, though the reasons for such actions were not uniform. *See* Power Outrage, *supra* note 36 (wherein utility companies and unions were acting together to stymie the deregulation movement).

[72]This occurred at the same time as FERC reduced restrictions on competition at the wholesale level. *See* Order No. 888, *supra* note 48 and Order No. 889 *supra* note 56. *See also* Power Outrage, *supra* note 36.

[73]OHIO REV. CODE ANN. § 4928 (West 2001).

competition by removing barriers to electricity marketers who would then be able to offer service to all customers in Ohio.[74] Called "retail wheeling," the sale of electricity to individual consumers would revolutionize the way in which utility services are distributed and purchased.[75] Upon completion of a "transition" period where incumbent utilities would be afforded a limited time to recover stranded costs, all power marketers would offer service and have to pay a uniform rate to the owners of transmission and distribution lines, therefore, competing on a level playing field.[76]

B. Is Deregulation Working as Intended?

1. Statutory Change in Regulation of Electric Utilities

Formerly, the distribution of electricity was governed by a quasi-monopolistic structure.[77] Under the monopoly structure, an electric utility provided service to a limited, designated territory in exchange for the exclusive right to provide service to all persons in that territory.[78] Under the deregulation plan, power marketers now can provide electricity, via the transmission and distribution lines of existing utilities, to customers anywhere in the state.[79]

While operating under the monopoly plan, the PUCO regulated the pricing of electricity.[80] The PUCO used rate applications submitted by utilities and granted approval of the rate when the provider justified its rate, including a reasonable return to its investors.[81] Under deregulation, while rates are reviewed by the PUCO, the electricity provider has much greater freedom to determine what it will charge.[82]

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[74]OHIO REV. CODE ANN. § 4928.02.

[75]Other utilities have also undergone deregulation in recent years including natural gas and telecommunications services. *See, e.g.*, J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 875-80 (1996).

[76]The ownership and operation of transmission and distribution lines would remain under the control of FERC. Order No. 888, *supra* note 48 and Order No. 889, *supra* note 56. While changes were also required in the wholesale transmission and distribution area, these changes did not directly affect individual consumers and are therefore not addressed in this paper.

[77]OHIO REV. CODE ANN. § 4933.83(A) (West 2001). "Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have exclusive right to furnish electric service to all electric load centers presently or in the future within its certified territory. ..." *Id.*

[78]*Id.*

[79]OHIO REV. CODE ANN. § 4928.04(A) (West 2001).

> The [PUC] by order may declare that retail, ancillary, metering, or billing and collection service supplied to consumers within the certified territory of an electric utility on or after the starting date of competitive retail electric service is a competitive retail electric service that the consumers may obtain from any supplier or suppliers subject to this chapter.

Id.

[80]OHIO REV. CODE ANN. § 4905.15 (West 2001).

[81]*Id.*

[82]Specifically, once the transition period ends, the competing utilities will not be required to charge the transition recovery charge for the former monopoly utilities. OHIO REV. CODE

Because there will be a theoretically larger number of suppliers available to all consumers, the cost per kilowatt hours (KWh) should go down for consumers, though the transmission and distribution charge will be uniformly applied to all electricity transmitted across a utility or ISO's power grid.[83] Ultimately, this process can result in lower prices for the consumer, though there is no guarantee that that will be the case.

The use of competitive mechanisms is intended to provide consumers with lower costs and also improve the efficiency of the utilities.[84] In a study of other deregulated industries, the savings to consumers over the initial two, five, and ten-year periods has been real and often dramatic.[85]

2. Supply and Demand Issues

Despite the rocky spring and summer endured by consumers in California,[86] system capacity nationwide is expected to grow significantly over the next several

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ANN. § 4928.07 (West 2001). Section 4928.35 governs the duration and collection of transition charges which competing utilities are obligated to collect until the end of the transition period. OHIO REV. CODE ANN. § 4928.35 (West 2001).

[83]This charge then does not make one power marketer more or less competitive than any other, the base rate per KWh is the primary cost basis for electricity consumers. An ISO is an Independent System Operator. An ISO or an RTO, a regional transmission organization, manages the flow of electricity across its grid to ensure power is readily available to customers that require it. In addition, the use of ISOs and RTOs to transfer power over long distances will also allow non-local marketers to ensure that they will be able to provide the electricity for which they accept consumer contracts. *See* FERC Order No. 888, *supra* note 48, and accompanying text. A problem, though not addressed in detail here, is that a generator in California or New England would be required to pay transmission charges across several ISO/RTOs and would bear a heavier transmission burden that would ultimately drive up the cost of electricity for new consumers. *But see* Robert J. Michaels, *The Governance of Transmission Operators*, 20 ENERGY L.J. 233, 235-56 (1999) (opining that the question of transmission rates is moot as FERC Order No. 888's "open access" requirement would prevent significant rate increases). Therefore, utilities would have to determine the point where the rate of return is so marginalized that it is no longer able to make a profit. This problem alone could effectively limit the ability of power marketers to actually enter markets which are not closely associated with an old "monopoly" territory or in close geographic proximity to the source of the KWh that it is reselling.

[84]*See* Nowiski, *supra* note 21. This view is contested by the Ohio Alliance for Affordable Power (OAAP), other lobbying groups, and virtually all investor-owned utilities that assert that under the Tenth Amendment, the States retain control of the regulation of retail distribution. OHIO ALLIANCE FOR AFFORDABLE POWER, RETAIL WHEELING OF ELECTRIC POWER: SECURING THE BENEFITS FOR ALL OHIOANS: A PUBLIC POLICY CHECKLIST. In addition, the OAAP sought to ensure affordability and choice, regulatory reform, safety and reliability, impact on service to consumers, tax revenues for schools and local governments, stranded investments, access, and social and environmental needs. *Id.*

[85]Of five major industries that were deregulated, prices fell four to fifteen percent within two years and at least twenty-five percent (and in some cases fifty percent) after ten years. Robert Crandall & Jerry Ellig, *Economic Deregulation and Customer Choice*, Ctr. for Mkt. Processes, Fairfax, Va. (1995). The industries involved in this study were gasoline, long distance telecommunications, airlines, trucking, and railroads. *Id.*

[86]*See* Jeffrey Hirsch, *Sudden Power Glut Puts State in Costly Bind*, L. A. TIMES, Aug. 11, 2001, http://www.latimes.com/news/nationworld/nation/la-081101glut.story. The California

years.[87] The generation capacity within Ohio has increased in the past several years, and will continue to do so in the short-term future.[88] The excess capacity of Ohio's utilities can be routed across transmission lines and ultimately sold to consumers across the country through the use of ISO and RTO transmission systems.[89] While this appears to be a positive factor for Ohio's relative cost of electricity, many of these plants are being constructed by out-of-state utilities.[90]

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deregulation plan required utilities to divest their generation facilities and purchase electricity via long-term contracts. Gregory M. Harvey, *Deregulation Done Right*, PA. LAWYER, Nov/Dec. 2001, at 40. The use of bonds to securitize the sale and provide a "stream of payments" was intended to assist utilities in maintaining sound financial condition while still granting consumers a ten percent rate reduction. *Id.* at 42. However, despite this goal, PG&E ended up filing bankruptcy and California has been forced to pay more than $13 billion to prevent rolling back-outs and even more funds to ensure long-term contracts. *Id.* at 40.

The contrast between the relative success of Pennsylvania's plan and the abject failure of the California plan has many bases, but perhaps the most critical was the requirement that utilities divest their generation assets. *Id.* Under the Ohio plan there is no legislative mandate that utilities sell their generation assets. *See* § 4905. In fact, FirstEnergy Corp. successfully acquired GPU, Inc., a Pennsylvania utility, because it retained its generation facilities while GPU voluntarily sold off its generation and ended up in a financial crunch as a result of the need to secure long-term contracts. Harvey, at 45.

At least one observer notes that the California problem is the result of problems with the "wholesale markets where power is bought and sold." Neela Banerjee, *States' Plans to Deregulate Get Second Look*, N.Y. TIMES, May 2, 2002 www.nytimes.com/2001/05/02/national/02DERE.html.

[87]Jerry Taylor, *A Man, A Plan – A Waste of Time*, NAT'L REV., June 11, 2001, at 17. "We're in the midst of a power-plant construction boom, with some 90,000 megawatts of new electricity capacity scheduled to come on line by 2002 and a staggering 150,000-200,000 megawatts by 2004." *Id.*

A potential problem may underlie the current utility building boom. The fear is that too much capacity will come online and overzealous utility companies could end up in bankruptcy for over-building. Harlan S. Byrne, *Too Much Power*, Barrons, Aug. 6, 2001. This argument asserts that too much capacity will come on line in the next several years and as it does, the price of purchasing power on the "day ahead" market will go below the break-even point and cause severe economic problems within the electric utility sector of the market. *Id.*

[88]Thirty-eight sites are approved for electric power generation facilities anticipating more than 10,107 MW of new power generation and peaking units to be constructed in Ohio alone. OHIO POWER SITING BD., 15.1.3(c) 2000 ANNUAL REPORT, PUB. UTILITIES COMM'N OF OHIO, *at* http://www.puc.state.oh.us/pubrel/opsb/2000AnnualRpt.pdf.

Another problem that cannot be resolved on a state level is the pricing mechanism employed in the power markets. "Last in pricing" is the method used by power traders whereby the last supplier who agrees to sell, at a higher price than the earlier bidders, will have that price apply to all bidders. The use of such a mechanism encourages utilities to hold back on committing to ensure that a higher rate is earned when selling power.

[89]Theoretically then, the California utilities in need of additional megawatts to meet the demand load of their systems could purchase the electricity from a utility in Ohio and have it routed across the system grid to be distributed to customers in California. The use of ISOs and interconnects to route power across the nation has improved dramatically and is a requirement of FERC Order 888 and 889, which requires creation of such pools. FERC Order 888, *supra* note 48.

[90]*See* OHIO POWER SITING BOARD, 2000 ANNUAL REPORT, *supra* note 88, *at* http://www.puc.state.oh.us/pubrel/opsb/2000AnnualRpt.pdf. Investor-owned utilities,

3. Are We NOW Totally Competitive? Can We Ever Go Back?

Under Ohio's deregulatory plan, for a period of five years electricity marketers are required to add a charge in their rates for stranded cost recovery.[91] After the completion of the five-year transition period, Ohio's system of retail wheeling electricity will operate on a "purely" competitive basis.[92] As a result, Ohio consumers are getting a sampling of what competition may ultimately prove to be, but true retail competition will not begin for another four years.[93] However, as a part of the Ohio plan, and under the FERC Order No. 888 rubric, transmission and distribution remain under a monopoly system for the time being.[94]

As demonstrated herein, the number of electricity providers initially jumped dramatically, but after a relatively short period of activity, most of those "competitors" have ceased taking customers or selling electricity at all.[95] Because the response of providers and consumers has been mediocre, consideration of reverting back to the monopoly system is not beyond the realm of discussion.

While it is theoretically possible to return to a *status quo ante* monopoly system, doing so is unnecessary and unrealistic. Unlike California, which required the sale of transmission assets and other drastic measures that altered the ownership of generation and transmission providers, the Ohio plan mandated the separation of generation from transmission, but did not mandate divestiture of assets.[96] Therefore, the monopoly utilities maintained ownership and control over their generation assets as well as transmission and distribution arrangements. Because there were no mandatory changes at such a basic level of the utility infrastructure, a total reversal, while difficult, would not be impossible.

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municipalities, and heavy industry have approval for thousands of MW in generation. This additional capacity (as well as peaking MW not included in this total) can be used to serve Ohio customers, but can also be transmitted to other areas to serve customers outside of Ohio. The recent acquisition of GPU, Inc. by FirstEnergy Corp. will provide FirstEnergy additional customers to serve, requiring additional MW of electricity with the customers located in Pennsylvania and New Jersey. *See* STRASSER & GOTTS, *supra* note 49, at 393-94.

[91]*See* OHIO REV. CODE ANN. § 4928 *et al.* (West 2002).

[92]The competitive basis, however, requires power marketers to qualify to do business in Ohio and other service minimums established for the protection of consumers. *See* OHIO REV. CODE ANN. § 4928.40 (West 2002) (establishing the end date for the transition period as being no sooner than December 31, 2005 unless certain conditions are met: a twenty percent switching rate of the utility load by the consumer class or the existence of effective competition in the utility's certified area). *Id.* § 4928.40(B)(2)(a)-(b).

[93]*See* OHIO REV. CODE ANN. § 4928.35 (West 2002) (stating the end of transition being five years after deregulation implementation which began on January 1, 2001).

[94]At this point in time, the unnecessary expense and redundancy of running parallel transmission and distribution lines along side the existing lines makes eliminating the transmission and distribution monopoly unlikely for the foreseeable future.

[95]*See* discussion, *infra,* notes 100-12.

[96]Unfortunately, some utilities did in fact make asset sales and other transactions in an effort to best position them for anticipated competition. If the deregulation plan is unwound, the state would have to exempt the transaction from litigation or in some way compensate the utilities that unnecessarily bore the costs of transitioning to a competitive environment (*i.e.*, tax breaks or some other financial incentive).

But should that option even be considered? I would argue no. In fact, instead of looking backward, finding a way to accelerate the complete transition to a purely competitive electricity market would only serve to improve the position of retail electricity consumers by encouraging the dormant providers to resume operations on a competitive basis. Options exist that would enable a more rapid transition to the competitive environment and should be considered by both Ohio and other states in the process of developing or modifying their deregulation plans.[97]

4. Transition Costs Passed on to Consumers for a Limited Time, Then "True" Competition

Under the Ohio Plan, stranded cost recovery will take place for a period of five years. After which time, the load in utility pricing will be removed and energy marketers will operate under a more authentic competitive marketplace.[98] This five-year period allows the incumbent utilities to recoup what the PUCO determined to be a reasonable amount of their stranded costs before having to compete with power marketers who do not have the stranded cost burden to overcome.[99]

This period of transition has resulted in an unexpected exodus of providers who found that competing while having to bear the load of transition cost recovery was not a financially viable option.[100] The failure of Ohio to first secure, and more importantly, retain competitive providers exposes the greatest weakness of the Ohio deregulation plan – the transition period.

PART IV

A. Is Implementation of Ohio's Deregulation Plan Actually Working?

1. Customer Choice Programs

The goal of all deregulation plans is to increase competition in the market.[101] In Ohio, the electricity deregulation plan mandated a customer choice program.[102] The program sought to encourage new energy resellers and marketers to enter the market

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[97] *See* discussion *infra* notes 130-50.

[98] OHIO REV. CODE ANN. § 4928.40 (West 2002).

[99] *See* OHIO REV. CODE ANN. §§ 4928.35, 4928.40 (West 2002).

[100] The entrance of forty-eight power marketers into the market and the fact that only thirteen are actively participating and only one is still accepting new residential customers reflects that this, as well as other problems, are hindering the development of an efficient market in the electricity market. *See* Ohio Electric Choice, *Certified Suppliers/Aggregations* (Jan. 4, 2002) *at* http://www.ohioelectricchoice.com/resources (on file with author).

[101] *See, e.g.*, OHIO REV. CODE ANN. § 4928.02(C) (West 2002):

> It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service: ... (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities...

Id.

[102] OHIO REV. CODE ANN. § 4928.04 (West 2002).

and solicit customers from incumbent providers by enticing consumers to change providers based on price, service or other service guarantee.[103] Theoretically, the increase in supply would then have the net effect of lowering prices to all consumers. Unfortunately, the actual results have been mixed to date.

In a statement issued on December 27, 2001, the Chairman of the PUCO noted that "the electric choice program is successfully on track and responsible for doubling awareness of electric choice across Ohio. In all, over half a million Ohioans have enrolled in Ohio Electric Choice by choosing an alternative electric supplier."[104] Unfortunately, Mr. Schriber failed to note how it was determined that awareness had doubled but merely 500,000 people had switched to other suppliers. The increase in consumer awareness but a lack of consumer changing of suppliers indicates that: (1) consumers simply are not interested in "shopping" for utility service; (2) the cost/benefit analysis done by consumers reveals that the savings are not worth the time required to figure out which deal is the "best" for them; or (3) that consumers are content with the rate they are currently paying. Whichever of the choices it may be, it certainly fails to reflect a state-wide consumer 'demand' that electricity be deregulated.[105]

At the time, the Ohio electricity market opened to competition on January 1, 2000, there were five incumbent electricity providers.[106] Over the next few months, more than forty marketers entered the Ohio market.[107] Thirty-one are no longer

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[103]*See generally*, Nowicki, *supra* note 21, at 447-52.

[104]Press Release, Alan R. Schriber, Chairman, Public Utilities Commission of Ohio, *Ohio Electric Choice: One Year and Counting*, *at* http://www.puc.state.oh.us/pr/2001/PR01-0106.HTML (Dec. 27, 2001).

[105]In fact, in the same press release Mr. Schriber concedes that, "[t]he already low prices offered by Ohio's electric utilities, particularly those in Central and Southern Ohio where choice is least successful do not provide consumers with much incentive to switch to an alternative supplier." *Id.*

The biggest positive that PUCO noted is the creation of aggregate buying groups and governmental aggregates which include more than 400,000 residential consumers. *Id.* It is unclear if these 400,000 are included in or separate from the 500,000 customers who have switched suppliers in the first year of competition. Either way, it is not reflective of a dissatisfied public overpaying for services if incoming power marketers cannot beat the existing rate being offered to those customers.

[106]Allegheny Power, American Electric Power, Cinergy, Dayton Power & Light, and FirstEnergy Corp. *at* http://www.ohioelectricchoice.com/resources/otherlinks.asp (Jan. 4, 2002).

[107]*See supra* note 100. The list of approved suppliers for both commercial and residential power marketing includes the following: Accent Energy (inactive); AEP Plus (inactive); Advantage Energy, Inc. (inactive); Allegheny Energy Supply Comp. (active for Commercial/Industrial customers); Alliance Energy Services (inactive); Amereda Hess Corporation (inactive); American PowerNet Services (inactive); APPI (inactive); beMANY (inactive); Biomass Group, LLC (not active); Bob Schmitt Electrical Aggregator (inactive); Buckeye Energy Brokers, Inc. (inactive); Cinergy Solutions Holding Company (presently inactive); Clinton Energy Management Services (presently inactive); Dominion Evantage (presently inactive); Dominion Retail (presently inactive); DPL Energy Resources, Inc. (presently inactive); DTE Energy Marketing, Inc. (presently inactive); Dynegy Energy Services (presently inactive); Eagle Energy (presently inactive); Econnergy Energy Company (presently inactive); electric AMERICA (presently inactive); Energy America (presently

active in Ohio, two are serving existing members only, and only two are actively marketing electricity to residential consumers.[108]

The large number of power marketers that originally rushed into Ohio in the hopes of creating a new presence in the state has all but left the state in virtually the same position it was in prior to the deregulation experiment.[109] Without the presence of alternative suppliers, the law of supply and demand holds that prices will inevitably rise due to any pressure to maintain or lower the cost to existing customers. Under the deregulation plan, the incumbent utility remains a provider of last resort, meaning that if no other supplier can solicit a customer away or the customer is unattractive to other marketers, the incumbent utility is obligated to remain the customer's provider.[110]

To promote deregulation and encourage marketers to enter Ohio, the PUCO required incumbent utilities to sell blocks of electricity at substantially discounted rates in order to "kick-start" competition.[111] For example, the PUCO required FirstEnergy Corp. [hereinafter "FirstEnergy"] to sell 1000 megawatts (MW) of

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inactive); Energy.com (presently inactive); Enron Energy Services, Inc. (active for Commercial/Industrial customers); Enron Power Marketing (presently inactive); Exelon Energy (active for Commercial/Industrial customers); FirstEnergy Solutions Corp. (active for residential and commercial/industrial customers); Green Mountain Energy Company (serving members only); Just Energy Ohio (inactive); (K2 Energy Advisors (inactive); MidAmerican Energy Company (active for Commercial/Industrial customers); Mutual Energy (inactive); National City Corporation (inactive); New Energy Inc. (active for commercial/industrial customers); Nicor Energy, LLC (active for Commercial/Industrial customers); Ohio Farm Bureau Development Corp. (serving members only); OMA Service Corporation (inactive); Power Direct (active for Commercial/Industrial customers); The Proctor and Gamble Distributing Co. (inactive); Sempra Energy Solutions (inactive); Shell Energy (active for Commercial/Industrial customers); Solar and Renewable Energy Buyers Cooperative (inactive); Strategic Energy LLC (active for Commercial/Industrial customers); U.S. Power & Gas, Inc. (inactive); Utilimax.com, Inc. (inactive); World Energy Solutions (inactive); and WPS Energy Services (active for Commercial/Industrial customers). *Id.*

[108]*See supra* note 100. The other ten are marketing power to commercial and industrial customers only. *Id.* The thirty-five marketers that entered and departed from the Ohio market were unable to secure a sufficient number of customers to justify remaining as an active participant in the market. A primary reason for leaving the state is the inability to compete *fairly* with incumbents who are still able to recover their transition costs for a period of years, after which, all parties will compete on a level playing field. If that is true, then at the end of the transition period on December 31, 2006, electricity marketers should quickly reenter the market. If that in fact occurs, the goal of the legislature (i.e., reducing the cost of electricity) may in fact be met, but until such time, deregulation has not resulted in true competition, but in a mixed bag of incumbent utilities recouping costs and electricity marketers being saddled with having to pass those same costs along to their prospective customers, thereby reducing much of the incentive for residential consumers to switch. *Id.*

[109]*Id.*

[110]*See* OHIO REV. CODE ANN. § 4928 (West 2002). This results in adverse selection against the incumbent provider who ultimately is much more likely to retain slow pay, delinquent and otherwise unfavorable customer accounts where marketers will not bear the burden of such clientele.

[111]FirstEnergy Corp., No. 99-1213-EL-ATA, 2000 WL 1791792 (Ohio P.U.C. July 19, 2000).

power to entering marketers to provide them an initial amount of capacity and in turn assist FirstEnergy in meeting its transition plan requirement that it shed 20 percent of its customers by the end of the transition period.[112] Despite the sale, only one substantial aggregate group of customers left FirstEnergy to contract with another provider.[113] Clearly, progress toward the legislature's stated goal of increasing competition when it passed the deregulation legislation has been less than stellar.

2. Pricing Issues

The Ohio deregulation plan required that utilities reduce their rates as well as break out and individually identify the component parts of a customer's charge.[114] This change allowed customers to see their "base" rate and make an informed comparison against the rates of competing electricity providers. While making efforts to simplify and encourage customer competition, the consumers failed to take advantage of, or did not find the savings sufficient enough to switch providers.[115]

3. Red-Lining Concerns Similar to Insurance and Banking

Power marketers could "cherry-pick" the areas in which they market their power to the exclusion of urban areas in which there is a higher rate of late-payment or delinquent accounts. Much like the insurance and banking industries, this could

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[112] *Id.* *See also*, FirstEnergy Corp., 203 P.U.R. 4th 102, 2000 WL 1791792 (Ohio P.U.C. July 19, 2000) (No. 99-1213-EL-ETP, 99-1213-EL-ATA, 99-1214-EL-AAM).

[113] The aggregate of municipal entities combined together and contracted with Green Mountain Energy Company. *See* Michael Scott, *Ballots Ask Who Will Deal for Power: Forty-Four Communities Propose Aggregation*, CLEVELAND PLAIN DEALER, October 31, 2001, *available at* 2001 WL 20554534. The "savings" offered to members of the aggregate are 1-3.5% below their current costs. *Id.* If a consumer has a $100 per month electric bill the maximum savings over the course of an entire year is approximately $42 annually or $3.50 per month (assuming the maximum 3.5% reduction in rate). It seems questionable whether this is the kind of "savings" the legislature intended when passing S.B.3. Clearly, the parties that save the most under this plan are the large industrial consumers with large fixed costs, who coincidentally are the parties that pushed for deregulation.

Unfortunately, this does not solve the true problem with deregulation. In the event that Green Mountain, the supplier that contracted with the aggregate of customers to leave FirstEnergy, fails to fulfill its contractual obligation, FirstEnergy will be forced to take those customers back as the provider of last resort in that geographical area. In doing so, no net change in customers will occur. Instead, the impact on the number of customers that switch providers in order to meet its PUC approved transition is questionable.

[114] *See* OHIO REV. CODE ANN. § 4928.07 (West 2002) (stating that an electric utility "shall separately price competitive retail electric services, and the prices shall be itemized on the bill of a customer or otherwise disclosed to the customer." *Id.*).

[115] The PUCO established a rate calculator form available in mass mailings and on its web page for consumers to check their rate against a competitive offer by following a simple, five-step progression. *See* PUCO, *Rate Calculator*, *at* http://www.puc.state.oh.us/ (on file with author). Despite these and other efforts by the PUCO and electricity marketers, the average consumer, in an overwhelming majority, elected not to change providers. *See* Schriber, *supra* note 104.

result in allegations of red-lining.[116] While the argument exists that electricity is different than insurance or bank loans, allowing this practice to go on unabated violates public and social policy goals, as well as "cherry-picking" the best clients and leaving the undesirable accounts with the incumbent provider who cannot avoid the transaction due to their status as provider of last resort.

B. Is the Ohio Plan Fair to Consumers and Utilities – from the Consumers Perspective?

The Ohio legislature intended deregulation to foster increased competition between electricity providers.[117] Applying basic economic principles, the increase in competition should result in a decrease in prices for consumers. Unfortunately, upon implementation of deregulation, in the short-term, prices for small consumers tend to increase, and only large consumers see reduced costs from the start.[118]

A straight-forward reading of the Ohio deregulation plan plainly states that increased competition and reduction in rates to consumers are the primary goals of the legislation.[119] The means by which those goals are to be achieved include: mandatory power sales to incoming power marketers, requiring that incumbent utilities shed a specific percentage of customers, and requiring an educational campaign to introduce and educate consumers on the new process.[120]

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[116]Red-lining is the practice of specifically excluding particular areas from a company's marketing or sales area based on demographics, most typically race.

[117]*See* OHIO REV. CODE ANN. § 4928.02 (West 2001).

[118]Texas Perspectives, Inc., The Potential Economic Impacts of Retail Wheeling in the Electricity Utility Industry in Ohio, submitted to Ohio Alliance for Affordable Power Small Business Survival Council, (presented Aug. 1, 1997 by Texas Perspectives, Inc.).

[119]*See* OHIO REV. CODE ANN. § 4928.03 (West 2001). There are nine primary aims of the deregulation plan: (1) to ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service; (2) ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs; (3) ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities; (4) encourage innovation and market access for cost-effective supply- and demand-side retail electric service; (5) encourage cost-effective and efficient access to information regarding the operation of transmission and distribution systems of electric utilities in order to promote the effective customer choice of retail electric service; (6) recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment; (7) ensure effective competition in the provision of retail electric service by avoiding anti-competitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and visa versa; (8) ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power; and (9) facilitate the state's effectiveness in the global economy. OHIO REV. CODE ANN. § 4928.02 (A)-(I) (West 2001).

[120]*See* OHIO REV. CODE ANN. § 4928 (West 2001). Chairman Schriber noted that the consumer education campaign is making great strides during the first year of deregulation, but the results fail to reflect any real changes in the overall state of the electricity market in Ohio. *See*, Schriber, *supra* note 104.

Competition up to now has not been fierce for the residential or commercial/industrial customer. As noted above, the number of electricity marketers appeared encouraging at the outset of deregulation. However, presently there are only two "new" providers open to accepting new residential customers.[121] The presence of only two new electricity providers fails to achieve the legislature's goal.

The problem is not as acute on the commercial/industrial side of the coin, but at the same time, competition among providers has, for the most part, resulted in a renegotiation of rates with the incumbent provider with no real switching taking place.[122] In practice then, the possibility of changing electricity providers for commercial/industrial customers is greater, but the changes are not actually happening as quickly or substantially as anticipated.

The overall price of residential service has dropped since the inception of the deregulation plan.[123] Empirically, the relative price for electricity service for a vast majority of Ohio electricity consumers shows no substantial reduction in rate because more than 95% of all residential customers have not changed electricity suppliers.[124]

Unfortunately, the reduction has been limited primarily due to the transition period that allows for stranded cost recovery.[125] Because each incumbent utility is

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[121] *See supra* note 100.

[122] *See* Schriber, *supra* note 104. What remains a question to be resolved is whether or not consumers actually have any interest in switching. While there is evidence that consumer education about Ohio Electric Choice has been effective, there simply is no evidence of consumer demand for alternative electricity providers. With the exception of 400,000 customers in a municipal aggregate scenario, there has not been a mass exodus from one provider to another. Further study is necessary to determine if the lack of movement of customers is related to lack of competition, consumer reticence to switching providers, or some other economic or outside impact.

[123] Gerald Alderson & Vicki Center, *Choosing an Electricity Supplier: A Research Study of Ohio's Residential Consumers*, WATTAGE MONITOR, Winter/Spring 2001. Unfortunately, it would appear that the rate has not fallen enough to cause customers to switch providers. *Id.* In a study performed for Wattage Monitor, more than 45% of the customers surveyed answered that price is the main motivator in their decision to switch suppliers. *Id.* The survey revealed that the amount Ohioans would consider sufficient to switch providers was approximately $5. *Id.* For example, customers of Ohio Edison, Cleveland Electric Illuminating, and Toledo Edison are saving at least $5 per month, with customers of Ohio Edison saving up to $9 per month on their electricity bill. *Id.*

At the same time, a full 75% of survey customers said they are considering or would switch suppliers for a better deal on their electricity. *Id.* A comparison of the reality of lower rates and a willingness of an informed public to switch suppliers simply has not resulted in large numbers of changes in suppliers. The reasons why have yet to be determined.

[124] *See*, Schriber, *supra* note 104.

[125] The imposition of transition costs is one of the reasons competitive suppliers have been unable to lure customers to their service. Forced collection on all suppliers of a stranded cost incurred only by the monopoly utilities make all suppliers constructively fungible. Barring a dramatically lower rate, there is nothing to distinguish suppliers when all are forced to collect fees from consumers. This problem will resolve itself in 2006 when the transition period ends. It could have been avoided altogether if the Ohio legislature had used securitization to recover the stranded costs of monopoly providers. *See* discussion *infra* notes 137-49.

permitted to recover its stranded costs as approved by PUCO and include that charge on the supplier's billing statement, consumers are not seeing the actual cost of their electric service.

C. The Central Problem with the Ohio Deregulation Plan is the Treatment of Stranded Cost Recovery Issues

The PUCO required each utility operating in Ohio at the time of deregulation to submit a transition plan in which the utility would lay out how it anticipated recovering its stranded costs and how it would make any necessary changes to its corporate structure and/or operations to conform to the deregulation plan as passed by the Ohio legislature.[126]

FERC Order No. 888 addressed stranded cost recovery as well.[127] Under the federal order, utilities can only recover stranded costs from customers that contract for service with a supplier that uses the transmission system of the former supplier.[128] The Order established that the FERC would be the arbiter of stranded cost recovery claims in specific circumstances beyond the scope of this Article.[129]

PART V

A. What Can be Done to Remedy the Problems with Deregulation?

Of the multitude of options available to state legislators working on deregulation legislation or modifications to existing plans, there are several options that could be considered to remedy the problem of limited competition and failure to develop a vibrant competitive marketplace. Some options are more feasible and logical, while others are drastic and could further hinder the creation of an efficient market in electricity in Ohio and in other states still forging their deregulation plans. These options focus on allowing recovery of transition costs. As will be detailed below, there are many methods of transition cost recovery that states can choose from, but three important choices are: (1) state subsidization of transition costs, (2) creation of a distinction between commercial/industrial and residential customers restricting competition to large consumers of electricity and keeping in place the present regulatory compact, or (3) securitization of stranded costs. For states that have not completed their deregulation and transition planning, perhaps the best choice is some form of securitization.

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[126]Ohio Public Utility Commission, Case No. 99-1141-EL-ORD, Re Electric Transition Plans, November 30, 1999. Electric Transition Plans, No. 99-1141-EL-ORD (P.U.C.Ohio Nov. 30, 1999) (finding & order).

[127]*See generally* Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (May, 1996).

[128]Jones Day Reavis & Pogue, 20 ENERGY BULL., Mar. 1997, (*citing* FERC Order No. 888 *supra* note 47).

[129]*Id.* Specifically, the expansion of municipal utilities that in turn provide service to formerly retail-only customers. *Id.*

1. Modify the Deregulation Plan to Shift the Recovery of Transition Costs to Responsible Parties

a. Subsidize the Transition Costs from the State and Not the Consumers

In order to ensure true competition from the start and thereby ensure a maximum likelihood that consumers would in fact consider other options for their electricity supplier, the plan could have required, but did not, that the State compensate the utilities for the lost transition costs. Because the utility companies operated at the behest and under the control of the state through the PUC, the responsibility for recovering the costs of transition should have rested on the State and not on the consumer.

The state and its various regulating agencies oversee the electricity utilities and the interactions between those utilities and its customers.[130] While utilities formerly had exclusive territories, those areas were purely creations of the state legislature.[131] Since the state has had, and continues to exert, control and pressure on utilities, the state is the party best able to absorb the financial burdens associated with the radical change in utility operations. A utility is only able to plan for anticipated needs and mandatory requirements enforced against it by the state. For a state agency to alter the entire structure of operation that has remained in place for the better part of a century without compensation for costs, creates serious questions of an unconstitutional taking.[132]

b. Separate Residential from Commercial/Industrial Consumers and Allow Competition for Large Energy Users

Large commercial and industrial consumers use hundreds of times more energy than a single residential consumer does in any given year. The current state of the electricity market implies that commercial/industrial customers are more desirable because (1) the economy of scale passes the break even point with larger consumers, or (2) the ability to lock larger users into long-term agreements where a breach of contract would be substantial enough to pursue legal remedies makes the investment of time and resources into securing the customer worthwhile.[133] In either event, the

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[130]*See e.g.*, OHIO REV. CODE ANN. §§ 4905, 4928 (West 2001).

[131]OHIO REV. CODE ANN. § 4933.83 (West 2001).

[132]*See* Turin, *supra* note 7, at 1428-29. As Turin points out, "the Takings Clause does not on its face, bar governmental action." *Id.* In making determinations as to takings issues a two-part analysis is required. *Id.* First, an analysis of the due process clause is required. *Id.* Subsequent to that, the question of whether the government owes compensation to the individual from whom the property is taken. *Id.* The Supreme Court has recently focused on three main areas of Takings Clause actions. *See generally* Turin, *supra* note 7. First, the Court has considered appropriations of property. *Id.* Second, regulatory takings have been considered. *Id.* These cases concern themselves with whether government regulations deny property owners economical use of their property. The third inquiry is a blend requiring the Court to consider a "due process-like, value based inquiry into traditional takings analysis." *Id.*

[133]Clearly, the likelihood of a utility suing a residential customer with no long-term contract is unrealistic. However, an industrial customer that has a long-term contract over a

residential consumer is not in a position to exert such leverage over his provider. Consequently, the savings that residential customers receive is not as great as it otherwise might be, and is therefore, discriminatory in nature.

Unfortunately for the residential consumer, the utility companies are simply following the mandate required in the deregulation legislation. In practice, the commercial/industrial customers have an unfair negotiating position and disproportionately large rate reduction, while residential consumers have only what they can garner from their incumbent carrier and the remaining electricity marketers.[134]

Because both the amount of electricity used and the relative bargain in positions of the residential versus commercial industrial customer are so disparate, the results of the deregulation plan have produced inequitable results.[135] In theory, the residential customer has the same bargaining position as a commercial/industrial customer. However, the relative impact on the utility company's income, power generation needs, and overall well-being are minimal in comparison for the average residential customer.[136] Therefore, in practice, deregulation has resulted in the consumer being able to get only what is offered by the limited providers, and nothing more. Compounding the problems for the residential customers (and to a smaller extent commercial/industrial customers), the drag of stranded cost recovery hinders the overall development of a healthy and economically viable electricity market.[137]

c. Utilize Securitization of the Stranded Costs to Allow Utilities to Recover Lost Investment.

Securitization of stranded costs allows utilities to use the securities market to finance recovery of their investment.[138] Utilities have previously used securitization to finance operations.[139] While utilities have used securitization before deregulation

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period of years and for a substantial amount of kilowatts has a much greater likelihood of resulting in litigation over a breach of contract.

[134]*See supra*, note 105. The options that remain for residential consumers are very limited.

[135]That is, the number of providers available to commercial/industrial customers is substantially larger than those available to residential consumers. *See supra* note 106. Additionally, residential consumers are parties to what amounts to a unilateral contract and do not possess the bargaining power of large commercial/industrial customers that enable them to individualize their contract and fixed costs.

[136]The average residential customer paying $1,200 per year is not going to have the capacity or ability to build their own generation facility on site, where a heavy industrial customer may have the ability and incentive to do so, in the event that their rates are not as competitive as desired.

[137]*See* discussion *supra* notes 90-99.

[138]Hall, *supra* note 3, at 377-81. The benefit of securitization of the stranded costs would be to allow investors access to highly rated debt and allow the utility to pay a lower interest rate on the loan. *Id.* At least two states, California and Pennsylvania, allow utilities to use securitization as a means to recover their stranded costs. *Id.*

[139]For example, debt was sold to investors to pay for conservation efforts (Puget Sound Power & Light Company 1995) and receivables have been sold (Centerior Energy Company 1996). *See generally* Hall, *supra* note 3, at 380-382.

for other purposes, using securitization for stranded cost recovery is a new concept. Puget Sound Power & Light Company issued $202 million in securitized debt to assist in paying for conservation expenses.[140] In order to use this financing method, the PUC approved the transaction and issued an irrevocable order to guarantee payment.[141] Securitization of stranded costs could be treated in a similar way.

Those in favor of this method assert that securitization allows utilities the ability to recover their stranded costs and maintain a stable financial footing and adjusts consumers' rates down.[142]

Those who oppose securitization see it as another boondoggle similar to the "nuclear mistake bonds."[143] The main points of disagreement include: (1) stranded costs cannot be definitively determined and as a result consumers are injured by over paying and that hinders incoming competitors; (2) a front-loaded infusion of such a large amount of capital gives existing utilities an unfair competitive advantage; and (3) use of securitization will delay the reduction in price to consumers.[144] Another complaint by those opposing securitization of stranded costs is that the utilities receive an immediate influx of cash from the sale of the bonds.[145] Finally, critics of securitization also point out that permitting utilities to securitize their stranded costs will allow them to recover on bad investments and forever shield rates from market scrutiny.[146]

At least one critic of stranded cost recovery has argued that it is a legitimate use of governmental power to deny utilities recovery of their stranded costs.[147] Relying on a purely economic argument, one argues that because stranded costs are outside the marginal cost of electricity, it is improper to allow recovery through market pricing.[148] The problem with that argument, however, is that under the same logic, the government ought to be able to refuse to pay individuals their income tax refund because although approved by Congress, repayment is outside the scope of Congressional authority. Such an argument fails even a cursory examination under both the Constitution and general business principles. For a heavily regulated industry that acts only with regulatory approval to be denied recovery of costs directly and indirectly imposed by the governmental authority amounts to an uncompensated taking of property in violation of the Fifth and Fourteen

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[140]*Id.*

[141]*Id.*

[142]*Id.*

[143]*See*, Hall, *supra* note 3, at 364.

[144]*Id.*

[145]DEAN E. CRIDDLE, FUNDAMENTAL PRINCIPLES OF ELECTRIC UTILITY SECURITIZATION, UTILITY RESTRUCTURING NEGOTIATING STRUCTURING IN DOCUMENTING THE DEAL 2000 (PLI Corp. Law & Prac. Course, Handbook Series No.1208, 2000). This is in clear contradiction to historical stranded cost recovery which occurred over a period of twenty to forty years.

[146]Kenneth Rose, *Securitization of Uneconomic Costs: Whom Does It Secure?*, 135 PUB. UTIL. FORT. 32 (June 1, 1997).

[147]Norwicki, *supra* note 21, at 452-59.

[148]*Id.*

Amendments.[149] To allow such an act would open the door to subsequent acts of uncompensated takings by government against other parties, and setting such a precedent is likely to be found unconstitutional.[150]

2. The Ohio Plan

The Ohio deregulation plan did not provide for securitization.[151] Had the PUCO elected to do so, a utility seeking to use securitization as a means of recovering its stranded costs could petition the PUCO for an irrevocable guarantee order. If the PUCO granted such a request, the utilities rates could be adjusted to reflect savings to customers. The tying of securitization with rate reduction and immediate savings to consumers would effectively negate the concern that consumers will not see short-term savings.[152]

The amount of debt the utility could sell would be determined by the PUCO, just as the amount of stranded cost recovery was determined under the existing plan.[153] In this way, the PUCO would maintain adequate control over a utility's ability to unfairly recover stranded costs that were wasteful or later determined to be unreasonable by the PUCO. Since the PUCO did just that in approving utilities transition plans allowing for stranded cost recovery under the deregulation plan, there would remain the critical element of regulatory control.

Finally, the question of front-loaded cash infusions negatively impacting competition is a difficult one.[154] Detractors dislike the massive infusion of cash to the incumbent utilities immediately as a result of the sale of the debt instruments. That concern must be balanced with the creation of a competitive environment that allows *all* consumers to experience the competitive environment, and not just the larger consumers that are in the best position to leverage their buying power in negotiating rates.

One possible remedy is to allow only utilities to securitize their stranded costs based on an overall percentage of the total amount as determined by the PUCO. In the alternative, utilities could be required to securitize their stranded costs in bands

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[149]The Fifth and Fourteenth Amendments require that when the government acts to take property from individuals they must be fairly compensated for the loss. U.S. CONST. amends. V, XIV, § 1.

[150]The Supreme Court has not addressed this issue in the electricity setting, but it has addressed the issue in other industries. *See* Turin, *supra* note 7, at 1433-35. In *Eastern Enterprises v. Apfel*, the Court in a plurality opinion determined that an economic substantive due process could come before the Court in the future for determination based on a challenge under the Coal Act. Eastern Enters. v. Apfel, 524 U.S. 498 (1998).

[151]OHIO REV. CODE ANN. § 4928 (West 2001).

[152]*See* discussion notes 90- 96 and 113-14, and accompanying text.

[153]OHIO REV. CODE ANN. § 4928.37 (West 2001). *See also* OHIO REV. CODE ANN. § 4928.40 (West 2001).

[154]There are serious issues associated with the viability of new providers to compete with incumbent utilities that would in effect receive tens of millions of dollars of capital where the new providers to a market would not have access to such funds. This issue is important, but beyond the scope of this paper.

with limitations on the maximum amount that can be sold in a given year.[155] The reality is that no solution involving securitization will completely level the competitive playing field for entering power marketers or other utilities. The goal instead should be to do as much as possible to create conditions to allow a vibrant market to develop for power marketers.

3. Why Should States Consider Securitization?

a. FERC Expressly Permitted Securitization as a Means of Recovering Stranded Costs in Order No. 888

The FERC gave state PUC's the ability to use securitization in the event that the states chose to use that as a means of resolving the stranded cost issue.[156] While the states are given authority by the FERC to utilize whatever methods of deregulation that they see fit, a common mandate for securitization or cost recovery method for utilities stranded costs could have eliminated the wide ranging deregulation plans, and effectively ensured that all utilities across the nation all compete on a level playing field.

The problem with allowing states to make determinations as to stranded cost recovery without considering the ramifications to out-of-state providers and power marketers is that the decision can put in-state utilities at a serious disadvantage when compared to out-of-state marketers.[157] Instead, a broad rule adopted by the FERC and mandated to the states dealing only with the issue of stranded cost recovery (be it securitization, mandates by FERC that costs be absorbed by incumbent utilities, or that a period of transition be permitted) would maintain a level playing field nationally and prevent unnecessary financial advantages or impairments to existing and newly created energy marketers.

b. Securitization Allows Utilities to Sell Debt to Investors Rather than Impose the Costs on Consumers With No Recourse.

The ultimate goal of the deregulation of utilities was to ensure that competition would thrive and that consumers would ultimately benefit from increased

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[155]For example, in Year one, Electric Company can sell 15% of its stranded cost amount, while the remaining amount is handled via cost distribution to customers, as it is now. In Year two, another fifteen percent of the remaining amount could be sold, and so on until a maximum of 75 percent of Electric Company's stranded costs were securitized and the remaining 25 percent was collected via surcharges to all utility bills. This allows competitors to enter the market knowing that a gradual reduction of costs is in place and an improved market is developing with a fixed end point and better entry point.

[156]*See* Order No. 889, note 56.

[157]For example, if State A allows securitization and Utility Co. B securitizes its stranded costs, even at a discounted amount, the rapid infusion of cash will place Co. B in a strong financial position, particularly in a time of consolidation within the utility industry. In State C, however, if the legislature does not allow for securitization and instead mandates that utilities in that state (Utility Co. D) absorb the costs, it will be in a potentially precarious financial position making it a merger target or possibly forcing it to file for bankruptcy. The wide ranging effects, from employer to stockholders, to state and local tax bases, could be serious. Implementation of a national rule on securitization and stranded costs would have prevented unnecessary disruptions to and additional consolidation within the industry.

competition in the way of lower utility costs. When the Ohio legislature decided to permit stranded cost recovery to take place over a period of five years, it required competing providers to add the stranded cost recovery charge to their fees, even though those companies had not incurred any of those costs.[158] This decision failed to create competition in the sense that electricity providers with no residual costs were being forced to act as if they too had stranded costs.[159]

The creation of an artificial playing field for power marketers for the five-year transition period works to hinder competition rather than improve it. Rather than allowing entities to enter a market and forcing them to operate with burdens imposed by the legislature to assist incumbent providers recover costs, granting power marketers the ability to simply sell their product unencumbered creates a truly competitive environment from Day 1 of the changed operating structure.[160]

The problem with the Ohio plan is that it failed to provide a market of this nature. To do so would have required Ohio to force utilities to absorb the costs, receive payment from the state as an unconstitutional taking or allow the utilities to securitize bonds that would recover the stranded costs that would otherwise be unrecoverable.[161]

c. Force the Utilities to Absorb their Transition Costs in a Competitive Environment

Ohio's choice not to select this option is a wise one. If left enacted, such a plan has all the markings of an energy catastrophe. It is estimated that there are more than $200 billion in stranded costs to be recovered by utilities.[162] Forcing the utility to absorb those costs immediately, and without any means to pay for them, almost certainly forces it into a bankruptcy situation.

Alternatively, a utility could sell long-term debt to finance recovery of their stranded costs with the PUC making a final determination of what that final amount ultimately is. The electricity marketers would then be able to sell their power to consumers at a true cost, not one muddied by the inclusion of another charge developed and payable to a third party.[163]

This option is clearly an inadequate solution. Because of the existence of the regulatory compact, utility companies planned and anticipated recovery for their capital investments in the form of "embedded costs" in the approved rates the PUC allowed them to charge customers.[164] As a result, utilities are still recovering the capital costs of old facilities and transmission/distribution investments. Mandating

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[158]OHIO REV. CODE ANN. § 4928.40(A) (West 2001).

[159]And in fact marketers were acting as collection agents for the incumbent utilities!

[160]*See generally supra* Part V.

[161]Bear Stearns, *Corporate Bond Research: Utility Securitization – What is a Stranded Asset? Whatever Regulators Say It Is*! Feb. 11, 1997.

[162]*See* Seiple, *supra* note 15, at 10-14.

[163]The inclusion of the stranded cost recovery that is included in a marketer's charge thereby waters down the potential savings a consumer might encounter and minimizes the potential benefits of switching electricity providers.

[164]*See*, Martin, *supra* note 11, at 1187-88.

that the utilities forgo their recovery under the terms of the regulatory compact could be considered a regulatory taking and therefore be a violation of the Constitution.[165]

As a matter of public policy, putting electricity utilities in the position of financial stress and possible bankruptcy is harmful to the utility, its investors, and customers whose electric service would be at risk.

Next, forcing an entire industry, one which had operated under the regulatory compact for more than a century, to switch immediately to a purely competitive environment ignores potentially devastating problems.[166] Financial decisions made by the utility involving long-term business decisions that the utility entered into (*e.g.* fuel supply purchasing agreements, union and labor contracts) may not be easily modified. The ultimate result of an immediate switch with no period of transition would be a significant negative impact on the utility's operation and financial health.[167]

B. Can We or Should States Ever Go Back to a Monopoly Environment?

There is a strong argument against deregulating residential electricity in those states that have not yet committed to deregulation.[168] Due to the mixed results in the

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[165]*See generally* Martin, *supra* note 11, at 1188-89.

[166]*See* discussion *supra* Part V, and accompanying notes 126-73.

[167]*See* Eric Hurst & Lester Baxter, *How Stranded Will Electric Utilities Be?*, 133 No. 4 Pub. Util. Fort. 30 (Feb. 15, 1995); *see generally* CRIDDLE, *supra* note 20; *but see* Nowicki, *supra* note 21, at 445-51.

[168]Rebecca Smith, *Nevada Derails Electricity Deregulation Fearing Repeat of California Problems*, WALL ST. J., April 19, 2001 at A-6.

> The Nevada state legislature passed a bill yesterday, which Gov. Kenny Guinn signed into law that cancelled the state's plan to deregulate its retail electricity market. The deregulation law was initially passed in 1997 but has since been delayed repeatedly in the face of California's problems with deregulation ... Under a provision of the new law; utilities will be able to pass on costs of soaring wholesale power prices to customers, but over a period of three years, through special accounts.

Id.

See also Christopher Swope, *The Deregulation Jitters*, 14 GOVERNING 9 (2001). "State legislatures around the country are hurriedly revising their utility deregulation plans in an attempt to avert politically sensitive energy crisis like the one in California this year. Most of these efforts focus on the construction of sufficient capacity to ensure adequate supply." *Id.* Unfortunately, unless the capacity is built in the areas of need, the problem then is sufficient capacity on an aging transmission system to route power to those areas most in need of additional MW; Neela Banerjee, *States Plans to Deregulate Get a 2nd Look*, N.Y. Times, May 2, 2001, *at* http://www.nytimes.com/2001/05/02/national/ 02DERE.html. "Nearly 75 percent of state utility commissioners interviewed 'expect the California situation will either stop or decelerate restructuring in their states,' according to the survey by RKS Research and Consulting, a marketing research firm specializing in the energy industry." *Id.*

Not surprisingly, the Enron scandal, while still not fully known or investigated, has quieted the loudest proponent of deregulation. David Koenig, *Enron Fall May Slow Plans to Deregulate*, AKRON BEACON JOURNAL, February 9, 2002, at E1. While it would not directly benefit from electricity deregulation, Enron acted as the primarily lobbyist in Washington, D.C. to Congress and regulatory agencies that over see utilities. *Id.* Some observe that the Enron debacle will impact state deregulation the hardest, Florida in particular where deregulation did not make it out of the legislature in 2001 and Pennsylvania where the

states that have elected to deregulate, the use of a controlled, known monopoly environment may be a better plan than creating a new, deregulated environment. Where the states in question are not subject to unusually high costs of electricity, dealing with the associated pitfalls, both known and unknown under a deregulation plan, may not be in the consumer's best interest.[169]

In theory, the entire exercise of deregulation in Ohio, unlike California, could be undone, but not without substantial cost to the state, expense to the providers of utility service, and discomfort of the consumers. Unfortunately, the practical reality of trying to unwind such a complex series of events would prove to be extremely difficult. The cost associated with deregulation to utilities would have been wasted and millions more would have to be spent to reverse the transactions undertaken by utilities to comply with the Act's mandates.[170] In all likelihood, Ohio would be faced with lawsuits from the utilities seeking recovery of expenses that were mandated and then would have to be unwound.

Under the utility structure prior to deregulation, the consumer and the utility had an established working relationship in which all parties understood their respective duties – the consumer paid the costs of the electricity provided by the utility and the utility provided the consumer a ready supply of electricity for their use.[171] Particularly in Ohio, where the cost of electricity is historically well below the national average, the savings that theoretically could be created are not dramatic.[172]

In those states where price issues are more of a concern, a more aggressive commission evaluation of utility costs and careful review of those expenses found to be recoverable as stranded costs is a first step to solving the rate problem. In addition, credits or incentives for utilities that improve their environmental position

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departure of most competitors has resulted in nearly no net change to the retail users of electricity. *Id.* There are others, however, who believe that the markets will continue to process the Enron collapse, but that "deregulation's biggest enemy may be apathy." *Id.*

[169]It is arguable that the residents of California who were subject to dramatic increases in electricity costs as well as the bankruptcy of one of the largest utilities in the United States would have preferred to remain under the monopoly plan. *See* Green, *supra* note 35.

[170]*See, e.g.*, Greg McDonald, *Utility Deregulation*, *at* http://stateline.org/issue.do?issueId=125 (Jan. 28, 2001).

[171]It has also been stated,

> The regulatory contract is often justified as a means for mitigating the risks of making large irreversible investments that are faced by regulated utilities. Customers of utilities gain from such commitments, since efficient levels of investment yield lower cost of service. There is an incentive to honor commitments regarding compensatory rates of return to assure that regulated firms will undertake future investment and that they will maintain their existing capital equipment. ... Cost of service regulation of public utilities is based on allowing the utility the opportunity to recover its investment, including a competitive rate of return. ... The purpose of the regulatory contract is to provide for recover of "economic costs", by which we mean the full cost of and activity ..."

See, Sidak & Spulber, *supra* note 75, at 880-81 (*citing* Daniel F. Spulber, REGULATION AND MARKETS 3 (1989)).

[172]As evidenced by the reduction in the average consumer's bill in the FirstEnergy Corp. service territory, long considered the most expensive electricity in the State of Ohio, being approximately $5 per month. *See*, Alderson & Center, *supra* note 123, at 4.

as well as the efficiency of their existing generation facilities would be an effective way to use government to improve the overall quality of the electricity utility markets as well as the industry as a whole.

PART VI

In sum, the electrical utility deregulation effort is not a situation that lends itself to a "quick fix" or short-term solution. Steps that may be required to remedy the serious issues already in existence in those states that have passed and implemented a deregulation plan may be uncomfortable and even painful to consumer and utility companies alike. Many good ideas exist in the various state deregulation plans, as well as the FERC-ordered deregulation, including: securitization of stranded costs, maintaining the current monopoly structure of currently regulated states, and other hybrid models that attempt to incorporate the best of all existing plans.[173] Unfortunately, there are countless combinations of possibilities to date. No one state has yet managed to find and implement the perfect "mousetrap."

The Ohio deregulation plan implemented some beneficial pieces (*e.g.* continued ownership of generation assets), but failed to utilize others (*e.g.* securitization) creating a setting where competition is intended and may ultimately arrive in the electricity markets; but for now, it has resulted in stunted growth and little demonstrable success in providing consumers a better way to shop for electricity.

In an effort to improve the Ohio plan in the short-term, use of securitization should be allowed, and in fact encouraged, with a corresponding reduction in rates to consumers for those utilities that elect to use securitization as a means of recovering their stranded costs, instead of completing their current transition period. By allowing utilities to best control their assets and manage their business in a way they best see fit yet remain under the supervision of the state regulating body will ensure the more rapid development of a truly competitive market.

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[173]For example, the Pennsylvania plan that did not force divestment of generation facilities (as did the California plan) and the Ohio Plan that uses a fixed period of transition cost recovery with limitations to recovery being managed by the state regulating body. *See*, Harvey, *supra* note 86, at 43-45.